Supreme Court, U.S.
FILED
JUN 4 1993
OFFICE OF THE CLERK

No. 92-1702

In The

Supreme Court of the United States

October Term, 1992

CARL A. MAAS, ET AL.,

Petitioners,

vs.

TEXAS AIR CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals For The First District Of Texas

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners direct this Reply to three points raised by Respondent in its Brief in Opposition to Petition for Writ of Certiorari: (1) Whether this Court has jurisdiction under 28 U.S.C. § 1257; (2) whether the issues raised in *In re Continental Airlines Corp.*, 901 F.2d 1259 (5th Cir. 1990), cert. denied, 113 S.Ct. 87 (1992), are distinct from the issue which petitioners seek to raise in this case; and (3) whether the petition is properly directed to the decision of the intermediate state appellate court.

I.

THIS COURT HAS JURISDICTION TO GRANT CERTIORARI

Respondent disputes this Court's jurisdiction to grant certiorari in this case under 12 U.S.C. § 1257. That section confers certiorari jurisdiction "where any right, title, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or any commission held or authority exercised under, the United States." Respondent claimed in the Texas Court of Appeals that Continental's rejection of the Basic Agreement pursuant to 11 U.S.C. § 365(a) terminated and canceled that labor agreement, and the Court of Appeals so held. Therefore, respondent set up or claimed a right under § 365(a), and the state court's interpretation of the effect of contract rejection under § 365(a) is reviewable by this Court.

Respondent further argues that petitioners are asking this Court to review the § 365(a) contract rejection decision made in the Continental bankruptcy. Petitioners have not complained of that decision in their petition. Petitioners do seek review of the state court's erroneous interpretation of the effect of that § 365(a) rejection on the TAC Side Letter. The Texas Court of Appeals' decision was not based on "state law principles of contract interpretation," as respondent argues (Resp. Br. at 6), but rather on a fundamentally erroneous interpretation of 11 U.S.C. § 365(a).

Finally, respondent asserts that § 365(a) is not before this Court because "Section 365(a) was never mentioned

by the court below." Resp. Br. at 6. The state court explicitly based its decision on the effect of the federal bankruptcy court's order approving contract rejection. Respondents have not suggested any legal basis other than § 365(a) for contract rejection in bankruptcy proceedings. Surely the fact that the state court chooses not to cite the section number of the federal statute it is interpreting cannot shield its decision from review by this Court.

II.

THIS COURT HAS NOT PREVIOUSLY CONSIDERED PETITIONERS' CLAIMS

Respondent suggests that this Court previously denied certiorari in a case raising the same issues and arising out of the same facts: *In re Continental Airlines Corp.*, 901 F.2d 1259 (5th Cir. 1990), *cert. denied*, 113 S.Ct. 87 (1992). Resp. Br. at 5. That case involved the calculation of the damages arising out of Continental's rejection of the underlying collective bargaining agreement. The present case does not present that issue at all. Petitioners brought this suit against TAC on the Side Letter; petitioners assert no claim in this suit against Continental on the collective bargaining agreement.

The issue here is the viability of respondent's § 365(a) defense to petitioners' Side Letter contract claim. The significance of this issue is enhanced by the fact that the TAC Side Letter was intended to provide employees with protection beyond a collective bargaining agreement with a subsidiary corporation employer. The pilots expected (and petitioners submit, had every right to expect) that

the Side Letter contract with respondent TAC, the parent corporation, would survive any § 365(a) rejection of the Basic Agreement by Continental. Therefore, the state court decision misinterpreting § 365(a) does seriously weaken employees' ability to protect themselves from an employer's use of the bankruptcy statutes to shed labor contracts it no longer desires to honor. These considerations justify review by this Court.

III.

PETITIONERS HAVE PROPERLY SOUGHT REVIEW OF THE DECISION OF THE TEXAS COURT OF APPEALS

Respondent argues that the petition for certiorari is defective because it "seeks certiorari to the Court of Appeals for the First District of Texas, which is not the highest Texas state court." Resp. Br. 2. However, this Court has held in at least two cases that its review is properly directed to the intermediate Texas appellate court when the Texas Supreme Court denies discretionary review of a Texas Court of Appeals' decision. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678, n.1 (1968); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954). Review by the Texas Supreme Court was discretionary in this case, and its refusal to accept the case with the notation "writ denied" is not a decision on the merits. Texas Rules of Appellate Procedure, Rule 133(a); V.T.C.A. Government Code § 22.001(a)(6).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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